



BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK SAN FRANCISCO SHANGHAI SINGAPORE TOKYO WASHINGTON, D.C.



CDIAC's MECHANICS OF A BOND SALE

The Legal Documents

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I. INTRODUCTION

II. THE PARTIES AND THEIR ROLES

A. Issuer and Its Staff

1. Treasurer/Finance Director
2. Project Manager
3. General Counsel
4. Others

B. Financing Team – Retained by Issuer

1. Financial Adviser

- a. Assist Issuer in the development of a financing plan, including an analysis of alternatives
- b. Develop a time and responsibility schedule
- c. Provide recommendations with respect to the structuring of the financing, for example:
 - maturity schedule
 - call features
 - use of bond insurance
- d. Assist bond counsel and disclosure counsel in the preparation of the legal documentation
- e. Develop rating agency presentations and assist Issuer in its communications with rating analysts
- f. On behalf of the Issuer, solicit bond insurance companies to obtain insurance bids (and reserve fund surety agreements)
- g. Oversee distribution of Preliminary Official Statement
- h. Communicate with prospective bidders (if public sale)

Notes:

- i. Oversee preparation and publication of Notice of Sale (if public sale)
- j. Receive and calculate bids (if public sale)
- k. Follow up

2. **Bond Counsel**

- a. Analyze, in a legal context, the purpose and goals of the Issuer's financing and the proposed financing structure, for example:
 - authority
 - statutes
 - tax law
- b. Analyze any legal procedural steps, for example:
 - election
 - notice
 - hearing
- c. Design the legal proceedings and prepare the legal documents for the financing and its closing
- d. Render opinions
 - validity and tax exemption (the "Bond" Opinion)
 - disclosure and securities law
- e. Follow-up

3. **Disclosure Counsel**

- a. Prepare Preliminary and Final Official Statement
- b. Prepare Bond Purchase Agreement
- c. Prepare Continuing Disclosure Agreement
- d. Render opinion (a "10b-5" opinion)

Notes:

4. **Trustee/Fiscal Agent**
 - a. Provide input with respect to the legal documentation
 - b. Receipt and administration of funds
 - c. Investment of funds
 - d. Bond Registrar
 - e. Paying Agent
 - f. Dissemination Agent
 - g. Source of information
5. **Administrator**
 - a. Tax covenants
 - b. Continuing disclosure
 - c. On-going reports
 - d. Land secured debt
6. **Dissemination Agent**
 - a. Review Continuing Disclosure Agreement
 - b. Monitor compliance with Continuing Disclosure Agreement
7. **Assessment Engineer or Consulting Engineer** – for special assessment proceedings or project financings
8. **Special Tax Consultant or Redevelopment Consultant** – for Mello-Roos special tax proceedings or tax increment financings
9. **Auditor** – consent may be required for inclusion of audit in Official Statement

Notes:

C. Financing Team – Others

1. Underwriter

- a. Competitive sale -- selected on the basis of bid
 - Review Preliminary Official Statement
 - Analyze the market
 - Submit bid
 - Distribute and file Final Official Statement
 - Deliver funds at closing
 - Provide a secondary market for the securities
- b. Negotiated sale – selected by Issuer
 - Compare responsibilities of financial adviser, see B-1 above
 - Distribute Preliminary Official Statement
 - At sale, price the securities and execute bond purchase agreement
 - Distribute and file Final Official Statement
 - Deliver funds at closing
 - Provide a secondary market for the securities

2. Underwriter’s Counsel – Retained by Underwriter

- a. Prepare Preliminary and Final Official Statement and accompanying documents
- b. Prepare Bond Purchase Agreement
- c. Prepare Continuing Disclosure Agreement
- d. Render opinion (a “10b-5” opinion)

3. Others: Rating agencies, insurer and its counsel, provider of credit and/or liquidity support (e.g., letter of credit bank) and its legal counsel, provider of reserve fund surety and its counsel, on-going investment adviser, other parties to investments (e.g., GICs), conduit borrower (e.g., 501c-3 entity, land developer, multifamily/single family developer)

Notes:

III. THE FINANCING DOCUMENTS

A. Authorizing Resolution

1. Approves and authorizes the financing
2. Establishes financing parameters
 - a. Not to exceed amount
 - b. Maximum interest rate (or savings)
 - c. Underwriters' discount
 - d. Other provisions
 - delegation of authority
 - insurance
 - credit enhancement
 - ratify and approve all other actions
3. Approves the financing documents and Preliminary Official Statement in substantially final form

B. Indenture/Fiscal Agent Agreement

1. This is the legal document that lays out the legal structure and terms of the financing. It will specify:
 - a. The maturities of the bonds
 - b. The principal and interest payment dates
 - c. The revenues and accounts specifically pledged to the repayment of the bonds
 - d. The flow of funds for the accounts (the mechanics of the cashflow)
 - e. Parity debt provisions (if additional debt is to be issued upon the same security)
 - f. The default and remedy provisions (in the event that something goes wrong)

Notes:

- g. Prepayment or redemption provisions (optional, extraordinary, sinking fund)
 - h. Investment of funds (“permitted investments”; who directs the investments)
 - i. Amendment process (with or without bondowner consent; bond insurer in lieu of holders)
 - j. Defeasance provisions, in the event the bonds are refunded or otherwise prepaid
 - k. Covenants of the Issuer (tax covenants, in enterprise financings-the rate covenant, in land secured financings- the foreclosure covenant)
2. Executed by the Issuer and the trustee/fiscal agent.

Notes:

C. Lease Purchase Agreement/ Installment Purchase Agreement

1. This document describes the manner by which a lessee/purchaser will acquire a capital asset from a lessor/seller. There are three general categories:
 - a. Direct Lease – The public agency leases the capital asset directly from the vendor or leasing company, with the vendor/lessor (*e.g.*, equipment lease).
 - b. COPs – Combining a tax-exempt lease with the sale of securities, certificates of participation (COPs), representing undivided interests in the rental or installment payments under the tax-exempt lease, are sold to investors (*e.g.*, the public agency that wishes to undertake a construction project enters into a tax-exempt lease with a nonprofit corporation or other lessor; the lessor acquires the applicable site either by purchasing it from a third party or by leasing it from the public agency (a site lease); the lessor, with the assistance of the public agency, undertakes the construction of the project on the site and leases the improved site to the public agency pursuant to a financing lease; the public agency makes lease rental payments under the lease which are assigned by the lessor to a trustee; the trustee executes and delivers to the underwriter certificates of participation in the lease payments ; a portion of each lease payment is designated as tax-exempt interest; the proceeds from the sale of the COPS are used to pay the costs of constructing the improvements; can also be used for enterprise financings using an installment purchase agreement.
 - c. Marks Roos Bonds – The public agency enters into a lease or installment purchase agreement with a joint powers authority, the payments under which are pledged as “revenues” securing bonds issued by the joint powers authority (*e.g.*, revenue bonds or lease revenue bonds); a portion of each installment payment is designated as tax-exempt interest; the proceeds from the sale of the bonds are used to pay the costs of constructing the improvements).

Notes:

2. The document will specify:
 - a. Purchase price
 - b. Installment payments (will track the Indenture)
 - c. Payment dates for the principal and interest (will track the Indenture)
 - d. Revenues and accounts specifically pledged to the payment of the installment payments
 - e. Flow of funds
 - f. Parity debt provisions
 - g. Default and remedy provisions (lease debt limit exceptions)
 - non appropriation
 - abatement (beneficial use and occupancy)
 - h. Prepayment or redemption provisions (will track the Indenture)
 - i. Discharge of installment payments (will track the Indenture)
 - j. Covenants
 - Insurance (types, *e.g.*, rental interruption)
3. Executed by the public agency (lessee/purchaser) and the lessor/sellor

Notes:

D. Official Statement

1. The Preliminary Official Statement (often referred to as the “POS”) is distributed by the underwriter to prospective investors prior to the bond sale so that the investor can make informed purchase decisions. The POS should be as close to final as possible with the actual terms of the pricing (interest rates and principal amounts) left necessarily blank (Rule 15c2-12 “deemed final” requirement).
2. The final Official Statement (often referred to as the “OS”) is distributed by the underwriter to all actual purchasers and must be available in sufficient time to accompany the “confirm” sent by the underwriter to the investor and in any event no later than 7 business days after the date of the bond purchase agreement. The final OS includes all final pricing information.
3. The Official Statement describes the security and discloses potential risks to the borrowers. It will generally describe the bond terms, a description of the legal documents, the security and sources of payment for the bonds, the nature of the project, if land secured financings – the value of the land securing the bonds, economic and demographic and financial characteristics of the Issuer, and inherent known risk factors associated with the security.
4. This is the Issuer’s document under applicable securities laws.
 - a. Who prepares
 - b. Required to disclose all “material” facts
 - c. What is “material”?
 - The standard is: the Official Statement must not include any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

Notes:

- The test is: A fact is deemed “material” if there is a substantial likelihood that, under the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable investor.

5. Contents

- a. Description of the bonds
- b. Description of the purpose of the financing
- c. Security and sources of payment
- d. Estimated sources and uses of bond proceeds
- e. Description of the project
- f. Description of the Issuer and Issuer’s revenues/funds securing the bonds
- g. Risk factors
- h. Other (*e.g.*, tax matters, ratings, litigation, continuing disclosure obligation)
- i. Appendices (audited financial statements, issuer economic and statistical data, form of bond counsel opinion, credit enhancement, summary of legal documents)

6. Executed by the Issuer.

Notes:

E. Bond Purchase Agreement (negotiated sale)

1. This contract, executed on the day of the bond sale, specifies the principal amount of bond to be sold, the maturity schedule, the interest rates, and prices at which the bonds will be sold. In it, the underwriter commits to purchase the bonds at closing (usually a week or two after the pricing in a fixed rate deal and next day or two in a variable rate deal) and the Issuer commits to sell the bonds at the agreed upon prices and amounts subject to certain closing conditions. Closing conditions generally relate to the execution and validity of all the required documents and the absence of material changes in the nature of the security, tax status etc. or absence of litigation. The underwriter may seek indemnification by the Issuer for actions brought in connection with the Official Statement.
2. Executed by the Issuer and the underwriter.

Notes:

F. Continuing Disclosure Agreement

1. This agreement, attached as an appendix of the Preliminary Official Statement, outlines the updated information related to the bonds that the Issuer will agree to provide to the bond markets. Disclosure is required annually and whenever a major “material” event occurs.
 - a. Who prepares (Issuer or counsel) and files (dissemination agent)
 - b. Obligated person
 - c. Deadline for filing
 - d. Provisions for non-compliance; Requirement to disclose any instance of non-compliance within last 5 years
 - e. Termination
2. Content of Updated Information
 - a. Audited financial statements
 - b. Update of operating and financial information set forth in Official Statement
 - c. Material events (11 specific significant events, per Rule 15c2-12)
3. Executed by the Issuer and the dissemination agent.

Notes:

G. Credit Enhancement Agreements

1. Bond insurance
 - a. Commitment letter
 - b. Insurance policy
 - c. Terms and conditions
 - d. Closing opinions and certificates
2. Letter of credit or Liquidity Facility
 - a. Terms of reimbursement or standby bond purchase agreement (e.g., payment on bonds, remedies)
 - b. Closing opinions and certificates

H. Other Documents: Closing Certificates; Tax Certificate; Letter of Representations (if book-entry bonds); Investment Agreement(s); Rating Agency Documents; Defeasance Documents (if financing involves a defeasance)

Notes:

IV. ISSUES FOR ISSUER AND ITS STAFF

A. Issues Related to Client

1. What is the client doing and why
2. Who is in charge
3. Are all appropriate members of staff involved
4. Is appropriate review process in place for disclosure information

B. Issues Related to the Project

1. Project Schedule
2. Timing of construction bids and bond sale
3. CEQA
4. Permits
5. Rights-of-way
6. Reimbursement of capital expenditures
 - a. The problem
 - b. The solution – “Official Intent Requirement”

C. Issues Related to the Financing Team

1. How will it be assembled
 - a. Identify the needed parties
 - b. How will they be selected
2. What is the manner of compensation
 - a. Hourly rate
 - b. Contingent fee

Notes:

D. Issues Related to the Financing and the Financing Documents

1. Understand the substantive issues and legal procedural steps attendant to the financing
2. Understand the security (the “pledge”)
 - a. Any prior pledge of the security
 - b. Future needs for the security
3. Understand the documents and the extent to which the Issuer will be involved
 - a. Securities laws
 - True and correct in all material respects and does not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading.
 - Indemnification
 - b. Issuer’s covenants and representations
 - Indenture (tax, continuing disclosure, rate covenant, additional bonds provisions, land secured – foreclosure covenant, annual reporting, notices, etc.)
 - Bond Purchase Agreement
 - Continuing Disclosure Agreement
 - c. On-going administration
 - Annual Reports
 - Continuing Disclosure
 - Other Periodic Notices or Filings
 - Monitor the tax covenants

Notes:

4. Understand the drafting and comment process
 - a. Early and continued involvement
 - b. Make Issuer's positions known, plan for future needs
 - c. Negotiations
5. Understand the certificates and opinions that will be required
 - a. General (*e.g.*, duly organized and existing, duly adopted documents, no litigation, no governmental approvals, no breach or conflict, accuracy of disclosure)
 - b. Due diligence
 - c. Other

E. Issues Related to the Issuer's Approval of the Financing Documents

- a. Review of Preliminary Official Statement
 - Securities laws
- b. Brown Act
 - Meeting, quorum, duly adopted
 - Borrowing funds – separate item of business on agenda (GC 53635.7)
- c. Delegation of authority

Notes:

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Practice Areas

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Bar Admissions

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- U.S. District Court, E.D. of Michigan, 1964
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- The University of Michigan Law School (J.D., 1964)
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JAMES L. COPELAND is counsel in the San Francisco office. He is a member of the firm's Public Finance Practice group.

Mr. Copeland has over 35 years of municipal law and municipal finance experience in most aspects of public finance law, as bond counsel, underwriter's counsel and purchaser's counsel. He focuses on the areas of special assessment and Mello-Roos financings and has primary responsibility for the firm's practice in these areas. Although his practice is focused primarily in California, he has also served as bond counsel on special assessment financings in Arizona, Arkansas, Colorado, Michigan and Nevada, and as purchaser's counsel for special assessment financings in Florida. In addition, during his career he has served as counsel to certain redevelopment agencies and has served and continues to serve as general counsel to certain public agencies. Combining his general counsel background with a municipal finance practice has enabled him to develop a broad understanding of municipal law issues as they relate to public financings.

Mr. Copeland is a member of the California and Michigan State Bar associations.